UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

RUBY RESNIK,
PLAINTIFF

Vs.

CIVIL NO.
09-5059 (PGS)

MICHAEL J. BOSKIN, et al,
DEFENDANTS

AUGUST 25, 2010
CLARKSON S. FISHER COURTHOUSE
402 EAST STATE STREET
TRENTON, NEW JERSEY 08608

B E F O R E: THE HONORABLE PETER G. SHERIDAN
U.S. DISTRICT COURT JUDGE
DISTRICT OF NEW JERSEY

HEARING ON DEFENDANT'S MOTION TO DISMISS

Certified as true and correct as required by Title 28, U.S.C. Section 753
/S/ Francis J. Gable
FRANCIS J. GABLE, C.S.R., R.M.R.
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(856) 889-4761

A P P E A R A N C E S:

BARRACK, RODOS & BACINE
BY: MARK R. ROSEN, ESQUIRE
FOR THE PLAINTIFF

DAY PITNEY, LLP
BY: ELIZABETH J. SHER, ESQUIRE
FOR THE DEFENDANTS

WEIL, GOTSHAL & MANGES, LLP
BY: JAMES W. QUINN, ESQUIRE, and
ANTHONY J. ALBANESE, ESQUIRE, and
ERIC C. HAWKINS, ESQUIRE
FOR THE DEFENDANTS

THE COURT: This is Resnik versus Boskin; is that correct?

MR. ROSEN: That's correct.

THE COURT: May I have appearances, please.

MR. ROSEN: Good afternoon, your Honor. Mark Rosen, Barrack, Rodos and Bacine, for the plaintiff.

THE COURT: All right. Good afternoon, Mr. Rosen.

MS. SHER: Good afternoon, your Honor. Elizabeth Sher from Day Pitney on behalf of ExxonMobil Corporation and all the individual defendants. With me today are James Quinn and Anthony Albanese, who have been admitted pro hac vice; and Eric Hawkins of the Weil Gotshal law firm. Mr. Quinn will be doing the primary argument.

THE COURT: All right, thank you, Ms. Sher.

MR. QUINN: Good afternoon, your Honor.

MR. ALBANESE: Good afternoon, your Honor.

THE COURT: All right. This is the defendant's motion.

MR. QUINN: Yes. Thank you, your Honor.

Your Honor, this is a motion to dismiss an action brought by plaintiff Ruby Resnik, a shareholder of the ExxonMobil Corporation. The case involves allegations that the proxy statements of 2008 and 2009, that ExxonMobil had issued to the shareholders were allegedly false --

THE COURT: They didn't tell them certain

compensation wouldn't be deductible; is that --

MR. QUINN: Yeah, the allegation is that the proxy statements in 2008 and 2009, did not disclose that certain executive compensation packages that had been approved years earlier, were not deductible. And we believe that as a matter of law the claim is fatally flawed. It's brought both direct on behalf of Ms. Resnik, and also derivatively. We think that the whole case is made of a house of cards.

Its most fundamental flaw is that with regard to the allegation that the statement -- that there was a failure to disclose the non-deductibility, the fact is that these compensation plans had been approved, in one case 13 years before, the other case seven years before. They were not the subject of the proxy at all. In fact, the proxy focused as they normally do on election of directors.

And the law, as your Honor may well be aware and we set forth in our brief, is that in order to make out a claim you have to show an essential link between the alleged misstatement or omission, and that which was actually being voted on.

And there is nothing pled in this complaint, and this is now their second time, second try at this, that shows or demonstrates an essential link between these -- the deductibility or non-deductibility of these compensation plans.

Fundamentally, one has to wonder what we are doing here in the first place. And the reason for that is, and we pointed this out in our brief, it's not at all clear there's even subject matter jurisdiction here.

The reality is that the IRS has never questioned the deductibility of these compensation plans; there's never been an investigation; the deductions have been taken for years; and even the plaintiff in her pleadings and brief admits that there's no way of knowing whether or not they'll ever been challenged. And under those circumstances it's hard to see why we're here at all.

But putting that aside, even if there were subject matter jurisdiction, more fundamentally the law that's set forth in the Third Circuit in the *G.E. versus Cathcart* case, is absolutely clear, you must plead specifically. And under the PSLRA and Rule 23(1), and of course the more -- the most recent cases from the Supreme Court, *Iqbal* and the *Twombly* case, you have to plead with specificity what an essential link was between the alleged omissions and -- and what is being voted on.

They haven't pled it, it doesn't exist. The only argument that they make -- this is on the direct claim, your Honor; the only argument that they make is that under a tax regulation, 402 -- and I'll try to avoid the arcania of the tax law, that there's a requirement, so they say, that you

must disclose tax implications with regard to items that are actually the subject matter of their proxy statements.

The reality is that Section 402, which we set forth in our brief, doesn't say that at all. It says that under certain circumstances it may, you may want to have disclosures relating to the tax treatment of items that are involved in the proxy statements.

But here, since there was nothing being voted on with regard to these plans in 2008 or 2009, they were -- had been in place for, in one case 13 years as I said, in the other case seven; there was -- there's no way that there was any rational basis, one would say you have to talk about the tax deductibility.

One of the things that's interesting that I don't know whether we pointed this out clearly in the brief, is if you actually look at what the only statement is that relates at all to this in this huge proxy statement, and we've attached a relevant portion which is Exhibits 3 and 4 of I believe it's Mr. Albanese's affidavit; the only actual statement that's made with regard to this issue at all, is that the -- referring to the compensation statements, that they are "designed to meet these requirements", that is the deductibility, designed to meet.

Well, there is no issue --

THE COURT: Where are we looking?

MR. QUINN: We're looking -- in this case it would be the attachment to the affidavit. It's Exhibit 3, your Honor.

THE COURT: I have 3.

MR. QUINN: And it's -- then go to page 28.

THE COURT: Okay, I have that.

MR. QUINN: And under tax and accounting matters, it reads, the short-term awards and restricted stock grants, which is the subject matter of these long previously approved compensation plans, described above are designed to meet these requirements. So that ExxonMobil can continue to deduct the related expenses.

Designed to meet. There's not an allegation that weren't designed to meet them, in fact they were designed to meet them. It's hard to understand what it is that the plaintiffs would say the disclosure ought to be. There's no allegation that in fact other than a claim that anyone knew that they weren't designed to meet them, or that anyone thought that they weren't deductible. The reality is they've been deducted for, in one case, close to or more than a decade.

So, it's hard to see how under these circumstances they even -- they even show the critical part that they need to show. Which again, is this essential link, can't be a trivial link. The Supreme Court in the *Mills* case has made

clear that it has to be directly related to what's being voted on. And they have not pled a single fact to show that there's any relationship between those statements and anything that's actually being voted on in 2008 and 2009 in the proxy statements.

THE COURT: Didn't you say to me earlier that you didn't vote on these things?

MR. QUINN: Exactly.

THE COURT: So there was no vote.

MR. QUINN: There was no vote whatsoever. This was information that is being passed along -- the fact of the matter is that their only argument is, as I say, this -- they cite to this regulation Section 402, and from that they say that therefore -- they make up a claim, which is a fascinating claim, it's a right to vote claim. They claim that Ms. Resnik should have been -- had the right to vote on these plans again, because under some arcane tax laws it -- there's a requirement that every five years they have to be reauthorized.

Well, there's no -- there's no private right of action under tax regulation. The issue is simply whether or not there was adequate disclosure and whether that was something that was false or misleading.

And given the fact that you have the case law with regard to the essential link point, the only other allegation,

which obviously they haven't pled, the only other allegation they've made is that -- I believe they say that the CEO or chairman, Mr. Tillerson had breached his fiduciary duty by not disclosing that in fact he had breached his fiduciary duty.

Well, the law in this Circuit, and we cited the *Werner versus Werner* case, but it also goes up to the Supreme Court as well; is that you don't have a proxy claim for a breach of fiduciary duty. That's a state law claim. You don't have a proxy claim for failing to disclose a breach of fiduciary duty. That's the Third Circuit law, it couldn't be clearer.

You can't, as the case -- the *Santa Fe* case said in the Supreme Court, you can't federalize a state law claim. And that is not a sufficient basis for showing an essential link between this non-vote that occurred, and the election of directors.

There's a case that we also cite, which is very close and it relies directly to *Cathcart* case, your Honor. This is a very recent 11th Circuit case, in *Goodman Life versus Jabil*, which is in our -- also cited in our brief; which again reiterates the essential link point, that you have to have an allegation linking directly and -- the vote to the alleged omission.

And it comes up specifically in the context of the of compensation plans. In that case it was a stock option

plan.

So, it couldn't be clearer. When *Cathcart* came down in 1993, it's still the law today. It's based on a Supreme Court's decision in the *Mills* case, which says it has to be something that's related. And under these circumstances there is no direct claim that Ms. Resnik can assert, and that claim should be dismissed.

Now --

THE COURT: What they're saying is that received one of these I guess grants or something, restricted stock grant --

MR. QUINN: He was part of the executive compensation, yes --

THE COURT: So he benefitted by it.

MR. QUINN: Yes, but that's -- this is a proxy case, there is no question that he benefitted by it, that's fully disclosed. He's the CEO/chairman, he's one of the number of executives that get this. This is a disclosure case, it's not a breach of fiduciary duty case. They can't make it as the *Santa Fe Industry* case in the Supreme Court said, you cannot federalize a state breach of fiduciary duty claim. It's not -- it's not a claim under the federal securities law.

THE COURT: So, if you're right, all the parties -- they're not diverse; right?

MR. QUINN: Yeah, that's correct, the case would

have to go.

And for the same reason I'll just briefly mention the derivative claim, because obviously if there' no direct claim, there's no derivative claim. But, in addition there's also a fundamental flaw in their derivative claim, because there's a failure to make demand and a failure to show that demand would be futile.

The only argument that the plaintiffs come up with, because they concede there's not an issue of disinterestedness, there's not an issue of -- or lack of disinterestedness or independence. They focus on the second part of the test, and the only argument they come up with is they essentially say that any proxy violation is exempted from the demand requirement.

Now, the law that has developed over the last few years, indeed there are two cases brought by the lawyers for this very plaintiff, where they made that same argument; one in the Second Circuit, and one in California, literally within the last -- last eight or nine months. Decisions have come down and said no, there's no special exemption from the demand requirement because there's an allegation of proxy fraud.

And the case law now is clear -- they cite to some old cases that have basically been distinguish or ignored. It couldn't be clearer that given the fact that, as your Honor is aware, derivative litigation is really a litigation on behalf

of the corporation, the case law is clear that in the first instance, absent some other showing, the board should be allowed to make a decision. They're the ones who are closest to it, they're the ones who can weigh the benefits and burdens of bringing litigation, and make a determination as to whether or not it's proper to bring that litigation.

So, the direct claim fails, because as I made clear there is no essential link. There's no ripeness here, there's no subject matter jurisdiction, nothing's happened; and the derivative claim also fails for those reasons, and because they failed to make an adequate demand.

THE COURT: Okay, thank you.

MR. QUINN: Thank you, your Honor.

THE COURT: Mr. Rosen?

MR. ROSEN: Thank you very much, your Honor. And I want to begin by thanking you for rescheduling this, from the problem we had two weeks ago.

THE COURT: No problem.

MR. ROSEN: There are a number of points I'd like to address, but first I'd like to do is put this action into perspective. Congress in enacting Section 162(m) specifically said, and we cited the legislative history relevant to it, that this is an act of corporate government, it's not simply a matter of taxation.

And it said if a public company's going to provide

compensation to executives in excess of a million dollars, it would not be deductible unless, and then we get into what are the requirements.

One of the requirements is there have to be objective criteria. The period of judgment has to be for at least a year, the criteria have to be set no later than 90 days into that one year or longer period, and that the people exercising that power the compensation committee do not have discretion. You have to meet the requirements.

And I respectfully submit, that my learned colleague has not entirely laid out the facts relevant to that. First of all on the issue of jurisdiction we pled both federal question jurisdiction on the federal claim, plus diversity jurisdiction.

Plaintiff is a citizen of New York, all the defendants are citizens of jurisdiction other than New York. So independent of the federal question I'll address in a moment why I believe the federal question is sustainable, there is diversity jurisdiction as well as 1367 pendant claim jurisdiction.

THE COURT: Okay.

MR. ROSEN: We asserted three claims; the first two are the direct claim, the claim under 14(a) of the 34 Act relating to the proxy statement, and the statement that these payments were deductible when we contend that they are not.

The second is a -- also a direct claim for failure to seek stockholder approval, and let me explain what that is.

The statute says if the compensation committee has the authority to change the criteria after it's been approved by the shareholders, then at least every five years they have to seek re-approval. Mr. Quinn referred to the fact that --

THE COURT: I'm sorry; there's someone talking out there, and they're interrupting the conversation.

MR. ROSEN: I'm sorry. Mr. Quinn referred to the fact that there were plans approved in '97 and 2003. Assume for the purpose of this discussion just for the moment that both the plans were valid. Then because we've alleged and the documents attached to Mr. Gershon's declaration show the relevant documents concerning the public statement, the public offering documents or the proxy statements, that the compensation committee had the authority to change the criteria. Then at a minimum by the year 2008 the 2003 plan was subject to re-approval, and the '97 claim was subject to re-approval at least twice.

Now, I have to apologize for maybe burying the lead, but I was reviewing the materials this morning, and I'm looking at Mr. Gershon's declaration, Exhibit 2, which is the 2010 proxy, for Exxon. And when I read it this morning something really jumped out at me that really explains in a nutshell how they're not complying.

And looking at the page that says on the bottom page 38, tax matters.

THE COURT: Let me get there. So it's Exhibit 2 --

MR. ROSEN: Exhibit 2 to Mr. Gershon's declaration, page 38.

THE COURT: Gershon --

MR. ROSEN: Gershon, my partner. On the top it says page 70 of 71.

THE COURT: I've got to find that.

Okay.

MR. ROSEN: It's page 38 on the bottom, on the top it says page 70 of 71 where the clerk's office automatically stamps the pages.

THE COURT: I got it. Okay.

MR. ROSEN: All right. Do you see the heading, your Honor, where it says tax matters?

THE COURT: Yes.

MR. ROSEN: The next sentence says, U.S. income tax law limits the amount ExxonMobil can deduct for compensation paid to the CEO and the other three most highly paid executives and then it goes on.

Then in the first paragraph below that it talks about the plans. And it goes on to say, if positive earnings are achieved individual awards to these executives are subject to a maximum cap of zero point two percent of earnings in the

case of short-term awards, and zero point five percent of earnings in the case of long-term awards, and then it talks about restricted stock awards.

Then here's the amazing sentence or two sentences that absolutely blew me away; these terms have been established to meet tax regulations and do not -- underscore the word not -- represent the actual operational goals we expect our senior executives to achieve; actual board levels are determined based on subjective consideration of all the factors previously discussed in this report, and have been significantly less than the shareholder approved caps.

Now, we filed suit before the 2010 proxy was issued, but this confirms the basic allegation, that because Section 162(m), and the regulations that the Internal Revenue Service issues implementing it say that criteria must be objective, it must not be discretionary. And they've basically conceded that they're not objective and they're entirely discretionary.

And as I understand the defendant's scheme -- I don't mean to say it in a disparaging way, but as I understand their system, the cap of one half of one percent I'll get into a moment of what it's one half of one percent of --

THE COURT: Why do you say they're not actual, because it says subjective?

MR. ROSEN: Subjective.

THE COURT: Okay. Well, that doesn't mean there's

not a standard; right?

MR. ROSEN: That's right, but the statute says and the regulations the IRS issued pursuant to Section 162(m) specifically say the criteria must be objective. There must be no discretion. In the words of the regulations I believe it says, an outside observer must be able to determine whether or not somebody has satisfied these requirements.

And we go back and forth about -- in the briefs about whether they need to actually disclose their criteria. But having conceded that it's a subjective test, that the committee has discretion to change the number, they've even effect conceded now, perhaps in response to this lawsuit, that they're not compliance with 162(m).

And let me explain how I think their scheme works. And I don't mean scheme in a derogatory sense. You take one half of one percent, they use the term net income of earnings -- net income term they use, I don't remember the exact term I have it in my notes. As of last year that was one half of one percent would be over four hundred million. And then they choose a number below that.

So it's not like the target -- not like if you meet this criteria you get four hundred million, it's we'll give something less than four hundred million and we exercise our discretion in doing that. That's exactly contrary to 162(m).

And all of that is background to the claims in this

case, the 14(a) claim, the claim for shareholder voting, and that in essence, your Honor, says that -- the law both in New Jersey and elsewhere recognizes that the infringement of a shareholder's right to vote is sufficient to state a claim. That's the *Penn-Texas* case by the Chancery Division; and defendants have cited a number of Delaware cases, one that they didn't focus on is *Tri-Star Pictures* which recognized a claim for wrongful deprivation for the right to cast an informed vote.

And of course the entire policy underlying Section 14(a) is that shareholders are entitled to disclosure of material information exercising their franchise.

Now, Mr. Quinn has argued at length that the 14(a) claim is fatally flawed for lack of showing a link between the misstatement and some shareholder action. The shareholder action in 2008 and 2009 was election of directors.

And the regulations state, we cite them in the brief and I can give your Honor the citation if you require it, that one of the things that must be included in the disclosure and the proxies is what they call a CDA, Compensation Discussion Analysis. And they're specifically required to discuss the tax and accounting treatment of the compensation that they're giving.

So, we have a situation where they're telling shareholders you should vote for the slate of directors which

includes the CEO who will benefit from this, without disclosing that in fact the representation that the system is designed to be tax deductible is not accurate.

We think that's clearly violation of 14(a). And it's also violation of the right to an informed vote.

Now, the third claim is the derivative claim. And that's the claim for breach of fiduciary duty and waste. Now, the New Jersey Supreme Court has confirmed that waste is the derivative claim in the Straussenberg (ph)case. Courts have certainly recognized claim of waste based on executive compensation, one is the *Citigroup* case decided by the chancery court in Delaware last year.

And Judge Rifkind, later the famous named partner Paul, Weiss, Rifkind, Wharton and Garrison when he was in your situation as a district judge, recognized the derivative claim where the directors caused the corporation to incur excessive tax liability for the benefit of the people who get the stock options and that's the *Truncale* case, T-r-u-n-c-a-l-e, versus Universal Pictures decided in 1948.

Now, in this case there is no reason for the defendants to adopt the system to pay their executives this compensation in a way that's not deductible, when they could have designed an equally effective system that would make it deductible.

So for example, if I'm a fiduciary and I'm an

executor of someone's estate and I know I have to hold funds for a year or two until the estate's ready to be wrapped up, and I have a choice of two identical investments, guaranteed CDs, insured, no risk it's within the insurance limit, and one pays one percent a year and one pays no percent a year, I respectfully submit I would be breaching my fiduciary duty if I choose the one that pays no percent a year.

But in effect that's the equivalent of what the directors in Exxon did. They created a system where they're saying we claim that we're concerned with the incentive compensation, and we claim that we're going to compensate based on criteria, but instead they said we're going to set the ceiling as high as the moon, four hundred million effectively, but we'll give some number less than that in our subjective judgment and as a result it qualifies.

In fact it does not qualify. And I would respectfully submit that they have not shown that it would qualify.

Now, the SEC has said that compensation arrangements including tax treatment is something material. The Third Circuit in *Shaev versus Saper* said in a similar case, that information about the deductibility of compensation is material, and if there's a misrepresentation it can be actionable.

And when we talk about what the law is whether this

is actionable or isn't, Mr. Quinn said well I cited a couple of very old cases and the law has changed. Setting aside *Shaev versus Saper*, which is a Third Circuit decision which said this is material, we have the decision of then District now Third Circuit Judge D. Brooks Smith in the *Westinghouse* case, where he specifically said -- and this isn't talking about derivative claims; you cannot subject a derivative claim relating to compliance or noncompliance with disclosure rules to the business judgment rule, it is not appropriate, because that trumps it.

If I -- and now I'm speaking my words not Judge Smith's words; if I'm an executive of a company and I have a contract with someone else to buy wheat or sell wheat whatever it is, it's certainly a business decision on my part to say the market has changed I'll perform or I'll breach, and if I breach I'll recognize the consequences.

But what Judge Smith was saying in *Westinghouse* and what the other cases we cited said, there's no discretion in complying or not complying with the federal securities laws. And because there's no discretion it is not an exercise of business judgment.

Now, what the New Jersey Supreme Court said in the *PSE&G* case, said there are two alternative ways to show there's no demand requirement, to be applied before you can bring a derivative suit. One is the issue of whether the

directors are independent and disinterested. We're not asserting that, set that aside.

But the other and the Supreme Court said in *PSE&G* as in Delaware the law is the same, you only need to meet one of the other requirements you don't need to meet both, if you can show the decision was not an exercise of business judgment that's committed to the directors.

And as Judge Smith explained in *Westinghouse* and as the other cases have explained, there is no discretion that says comply with the securities laws versus don't comply with the securities laws and therefore there is no reason to require demand.

And that's precisely what differentiates this case from the cases they're relying upon, because there is no discretion. And as I hoped to explain earlier, that's why they were required to make these disclosures.

And by the way, Judge Smith isn't alone there. Defendants cite a lot of Delaware law, there are at least two cases, *Tri-Star Pictures* decided in 1990, *Anderson Clayton* decided in 1986, both of which said that the business judgment rule does not apply to the question whether shareholders had been given appropriate information.

So there's I would respectfully submit broad support. So when the court is saying what at the governing law, there is no Supreme Court precedent that controls. But

there is the Third Circuit decision in *Shaev versus Saper* which says the tax treatment of executive compensation is material to shareholders. And we have Circuit Judge Smith's decision while he was still a district judge in *Westinghouse* that said, this should not be subject to demand requirement, which is consistent with the others.

And then of course there's a Second Circuit case -- and also by the way there's a -- a case from your colleague in Delaware, *Seinfeld versus Barrett*, which also said the same thing. And there's a Second Circuit case, The *Galef*, G-a-l-e-f, case, where the court said the goal of Section 14(a) the communications from management be accurate and complete as to all material facts is a vital one; its achievement would quite clearly be frustrated if a director who was made a defendant in a derivative action for providing inadequate information -- and goes on -- was permitted to cause the dismissal of that action based on his judgment that its pursuit wasn't in the best interest of the corporation.

And it concludes; therefore, federal policy prevents the summary dismissal of these claims based upon business judgment. So, all those reasons are there.

I just want to address a couple other points unless your Honor has questions.

THE COURT: I don't have any questions.

MR. ROSEN: Well, if I could just make -- respond to

a couple of Mr. Quinn's points.

THE COURT: You may.

MR. ROSEN: He makes the argument the claim is either not ripe or not timely, in fact defendants make both arguments. They say the claim as to the 2008 proxy is untimely, because it's more than a year after the issuance of the 2008 prospectus; and then literally in the next breath they say, and it's not ripe to sue because there's been no IRS determination, no resolution of the tax issue.

But in fact, as the judge said in *Westinghouse* there is no requirement, and in the other case that we cited before your Honor, there is no requirement that there be a final adjudication by the IRS for this to be material --

THE COURT: That's fine, I understand that.

MR. ROSEN: And if I could just respond to a couple other final points he made. So, the essential link argument is that they ask shareholders to vote for directors, they didn't disclose this information.

Mr. Quinn says well there's no duty to accuse yourself of breach of fiduciary duty. There's a case that directly addresses it, that unfortunately I'm quite familiar with because I was a defense counsel and it's called *Craftmatic*, decided by the Third Circuit in 1989 cited in the papers.

And *Craftmatic* says -- Craftmatic was a company, a

consumer goods company they sold beds and chairs on late night TV. And they were under investigation by various state attorneys general.

And we the defendants in that case made the exact same argument Mr. Quinn made, you can't dress up a breach of fiduciary duty claim into a 14(a) suit of clothing was I think the phrase that was common in those days, more than 20 years ago.

But what the Third Circuit said is, you don't need to accuse yourself of a breach of fiduciary duty, but you do need to disclose the facts, and if the facts are you're under investigation you should have disclosed that.

So Mr. Quinn is right, Mr. Tillerson and the other directors weren't required to stand up and say we're breaking the law, but they were required to say the plan is not in compliance. They weren't required to say we're looting the company, but they were required to say the plan is not in compliance. And they didn't do it.

He also --

THE COURT: Wasn't in compliance with what?

MR. ROSEN: With Section 162(m) of the Internal Revenue Code and the regulations --

THE COURT: So they had to be re-approved every five years.

MR. ROSEN: Every five years. So at a minimum even

if these payments were made pursuant to the 2003 plan, by 2008 it was due for renewal, they didn't do it in 2008 they didn't do it 2009 and they didn't do it in 2010 as reflected in that quotation I was referring to.

He also cited a California case, but in California the demand requirement was by statutory mandate, and that's very different from the situation here.

So, we think we've stated a claim under 14(a), we stated a claim for the right to vote, and we certainly state a claim for breach of fiduciary duty and waste, because they've subjected the company to significant tax liability when they could have easily avoided it.

Unless your Honor has any other questions that's --

THE COURT: No, I don't. I've been through the papers once or twice, and I need to do some more reviewing and read some of the cases that were cited to me. And after that I'll be able to make a decision.

MR. ROSEN: Thank you very much, your Honor.

THE COURT: Mr. Quinn, do you have a response?

MR. QUINN: Just two minutes, your Honor.

THE COURT: At the most.

MR. QUINN: Absolutely the most.

First, on the demand point, it's curious that Mr. Rosen doesn't cite to the two cases where his firm lost this very issue, the Second Circuit in California. But we'll move

on.

THE COURT: All right.

MR. QUINN: On this deductibility point, this is -- this is the classic putting the rabbit -- I think your Honor already got this, the putting the rabbit in the hat; saying it's not deductible, you didn't disclose it. Well, no one's ever said it's not deductible, they don't have a private right of action under the IRS rules and regs, this is a disclosure case.

And the last point, and as I said, two minutes or less, they cite to a case in the Third Circuit, the *Shaev* case, well, that actually proves our exact point. In that case, what was being voted on was the compensation plans. And in that case there was an essential link between the voting and the disclosures. Exactly the opposite of what we have here.

These were compensation plans as your Honor already knows that were voted on 13 and seven years ago. There's no essential link, the law could not be clearer. This should be dismissed, your Honor.

THE COURT: All right. Okay. So, I've listened to the arguments, and it's going to take me a few weeks to respond. So, what I wanted to know at the present time, is there any discovery going on in this case?

MR. QUINN: No, your Honor, because the PSLRA

requires that until the motion to dismiss is decided, the discovery is stayed.

MR. ROSEN: Your Honor, just to qualify that slightly, Judge Salas when she had our initially discovery conference with us had set up a discovery schedule, over defendant's objection based on the PSLRA. And then defendants appealed it to your Honor, and based upon that we were -- it was our understanding your Honor had informally advised us that you considered the stay.

We would like to go forward with some very focused discovery, we think it's appropriate looking at their compensation committee, looking at their board, minutes and the compensation minutes, any compensation consultants. We think in some form this action is going to proceed and we ought to be focused on those issues and we'd like to proceed with discovery, the Court has authority to lift the stay, we think it would be appropriate here.

THE COURT: All right. So, I'll take a look at the stay at the present time. If I find that -- what type of discovery you wanted to do, you said it's focused?

MR. ROSEN: Very much so, your Honor, we'd like any -- the reports and any communications with any compensation consultants; we'd like the minutes and any communications with the compensation committee; similarly minutes and any communications with the board and obviously with Mr. Tillerson

or others in the administration of Exxon about these issues.

THE COURT: Okay.

MR. ROSEN: I don't want a grand inquisition I don't need it, but this is very focused --

THE COURT: I just need -- my own feeling is I always like the cases to move on. If I could get some discovery going over the next few weeks before I make a decision, it might be worthwhile in the long run.

MR. ROSEN: I agree, your Honor.

MS. SHER: Your Honor, with all respect, given your Honor's prior ruling consistent with the statute that discovery would be stayed, if you're going to consider lifting the statutory stay, we'd like the opportunity to address that before it's just ordered. Because we haven't had --

THE COURT: I'll probably call on the phone and request for comments.

MS. SHER: That's fine, your Honor.

MR. ROSEN: Thank you, your Honor.

MR. QUINN: Thank you, your Honor.

THE COURT: Thank you for coming in.

THE DEPUTY CLERK: All rise.

(Matter concluded.)

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